Wong Sin Fan & Ors v Ng Peak Yam @ Ng Pyak Yeow & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–59–09 OF 2011(W)
RAUS SHARIF PCA, ZULKEFLI CJ (MALAYA), HASHIM YUSOFF, AHMAD MAAROP AND SULONG MATJERAIE FCJJ
17 JANUARY 2013

Companies and Corporations — Winding up — Suit by and against company — Liquidators engaged advocate to bring and defend action on company's behalf — Advocate's bill for work done approved for payment by majority shareholders of company — Whether advocate's bill should have been taxed pursuant to r 173 of the Companies (Winding-Up) Rules 1972 before payment made — Whether r 173 only concerned services of advocate in assisting liquidator perform ordinary administrative and management duties

The respondents were liquidators of Folin and Brothers Sdn Bhd ('Folin') which was wound up by order of court. The appellants, who owned 75% of Folin's shareholding, applied to the High Court to have the respondents removed as liquidators under s 232 of the Companies Act 1965 ('the Act'). One of the grounds cited in support of their application was that the respondents had paid the bills of lawyers engaged by them to act for Folin without requiring the bills to be taxed pursuant to r 173 of the Companies (Winding-Up) Rules 1972. The bills in question related to litigation matters that involved the appellants, the respondents, Folin and its wholly-owned subsidiary, Folin Food. The High Court dismissed the application and with regard to the ground concerning the taxation of the bills, it held that r 173 only applied to services rendered by an advocate in assisting a liquidator perform his ordinary administrative and management duties as envisaged by s 236(1) of the Act. The services for which the lawyers were engaged in the present case were for defending an action on Folin's behalf under s 236(2) of the Act. Furthermore, the cheques for payment of the lawyer's bills were signed by the respondents only after the appellants had approved the payments. The Court of Appeal upheld the High Court's decision on appeal. The appellants were granted leave to appeal to the Federal Court.

Held, dismissing the appeal with costs:

(1) Rule 173 was meant to only apply to services envisaged under s 236(1) of the Act. It was clear the services referred to were those rendered to the liquidator in the performance of his ordinary administrative and management duties. In the present case, the advocate's services were for bringing and defending action on behalf of Folin under s 236(2) of the Act. Therefore, they did not fall under r 173 (see paras 15 & 17).

(2) As to the argument that r 173 should be read together with r 165, the latter gave the liquidator a discretion whether to require the bill to be taxed. Under r 165, it was only upon the liquidator's request that a solicitor was required to deliver a bill of costs to the taxing officer to be taxed. Rule 165 therefore was a discretionary provision (see paras 17–18).

(3) In the present case the liquidators had obtained an order from the winding-up court to appoint solicitors to act for Folin. The first appellant was responsible for negotiating the fees with the solicitors and the cheques for the payments were approved by the appellants (see para 21).

(4) The r 173 question posed by the appellants in the present case had no relevance in deciding the integrity of the respondents and their removal as liquidators. In practice, solicitors' bills were not taxed. Therefore, based on the factual circumstances of the case, the respondents could not be said to have acted so unreasonably that no other liquidators would have acted in the manner they did (see para 22).

[Bahasa Malaysia summary

Responden-responden merupakan penyelesai-penyelesai Folin and Brother Sdn Bhd ('Folin') yang telah digulungkan oleh perintah mahkamah. Perayu-perayu, yang memiliki 75% daripada pegangan saham Folin telah memohon kepada Mahkamah Tinggi agar responden-responden dialihkan sebagai penyelesai-penyelesai di bawah s 232 Akta Syarikat 1965 ('Akta tersebut'). Salah satu alasan yang dipetik bagi menyokong permohonan mereka adalah bahawa responden-responden telah pun membayar peguam-peguam yang dilantik oleh mereka untuk bertindak bagi pihak Folin tanpa memerlukan bil-bil dikenakan cukai menurut k 173 Kaedah-Kaedah (Penggulungan) Syarikat 1972. Bil-bil yang dipersoalkan berkaitan perkara-perkara litigasi yang melibatkan perayu-perayu, responden-responden, Folin dan subsidiari milik penuhnya, Folin Food. Mahkamah Tinggi telah menolak permohonan itu dan berkenaan alasan tentang pencukaian bil-bil tersebut, ia memutuskan bahawa k 173 hanya terpakai kepada perkhidmatan yang diberikan oleh peguambela dalam membantu penyelesai melaksanakan kewajipan-kewajipan pentadbiran dan pengurusan biasanya sebagaimana termaktub dalam s 236(1) Akta tersebut. Perkhidmatan yang mana peguam-peguam dilantik dalam kes ini adalah untuk membela tindakan bagi pihak Folin di bawah s 236(2) Akta tersebut. Tambahan pula, cek-cek untuk bayaran bil-bil peguam telah ditandatangani oleh responden-responden hanya selepas perayu-perayu telah meluluskan bayaran-bayaran tersebut. Mahkamah Rayuan telah mengekalkan keputusan Mahkamah Tinggi. Perayu-perayu telah diberikan kebenaran untuk merayu kepada Mahkamah Persekutuan.

Diputuskan, menolak rayuan dengan kos:

(1) Kaedah 173 hanya terpakai kepada perkhidmatan yang termaktub di

bawah s 236(1) Akta tersebut. Adalah jelas bahawa perkhidmatan tersebut merujuk kepada penyelesai dalam pelaksanaan kewajipan-kewajipan pentadbiran dan pengurusan biasanya. Dalam kes ini, khidmat peguambela adalah memulakan dan membela tindakan bagi pihak Folin di bawah s 236(2) Akta tersebut. Oleh itu, ia tidak terangkum di bawah k 173 (lihat perenggan 15 & 17).

(2) Berhubung hujah bahawa k 173 patut dibaca bersama k 165, k 165 memberikan penyelesai budi bicara sama ada untuk meminta bil yang akan dikenakan cukai. Di bawah k 165, hanya atas permintaan penyelesai sahaja peguamcara dikehendaki untuk menyerahkan bil kos kepada pegawai percukaian untuk dikenakan cukai. Kaedah 165 dengan itu adalah peruntukan atas budi bicara (lihat perenggan 17–18).

(3) Dalam kes ini penyelesai-penyelesai telah memperoleh perintah daripada mahkamah penggulungan untuk melantik peguamcara untuk bertindak bagi pihak Folin. Perayu pertama adalah bertanggungjawab untuk berunding tentang fi dengan peguamcara dan cek-cek untuk bayaran-bayaran tersebut telah diluluskan oleh perayu-perayu (lihat perenggan 21).

(4) Persoalan k 173 yang dikemukakan oleh perayu-perayu dalam kes ini tidak relevan dalam memutuskan integriti responden-responden dan penyingkiran mereka sebagai penyelesai-penyelesai. Dari segi amalan, bil-bil peguamcara tidak dikenakan cukai. Oleh itu, berdasarkan fakta kes, responden-responden tidak boleh dikatakan telah bertindak secara tidak munasabah sehinggakan tiada penyelesai lain yang mungkin bertindak sebagaimana yang telah dilakukan oleh mereka (lihat perenggan 22).]

Cases referred to

Andrew Christopher Chuah Choong Eng Chuan v Ooi Woon Chee & Anor [2007] 2 MLJ 12, CA (refd)

Micropolis (S) Ltd, Re [1998] 3 SLR 951, HC (distd)

Ng Yok Gee & Anor v CTI Leather Sdn Bhd (Metro Brilliant Sdn Bhd & Ors, intervener) [2006] 7 MLJ 28, HC (folld)

Zaitun Marketing Sdn Bhd v Boustead Eldred Sdn Bhd (formerly known as Bousted Trading (1985) Sdn Bhd) [2010] 2 MLJ 749; [2010] 3 CLJ 785, FC (refd)

Legislation referred to

Companies Act 1965 ss 232, 232(1), 236(1), (2), (2)(a)
Companies (Winding-Up) Rules 1972 rr 45, 165, 173

Appeal from: Civil Appeal No W-02 (IM)-2880 of 2010 (Court of Appeal, Putrajaya)

Christopher Leong (Shamala Balasundaram with him) (Chooi & Co) for the appellants.

Arthur Hong Ming Way (Simon Hong and Shareena Shahril with him) (Guok Leong Hong & FongTay & Partners) for the respondents.

Zulkefli CJ (Malaya) (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the appellants against the decision of the Court of Appeal on the 5 May 2011 in dismissing the appellants' appeal against the decision of the High Court dismissing the appellants' application vide notice of motion ('encl 368') pursuant to s 232 of the Companies Act 1965 ('the Act') to remove and replace Ng Peak Yam, the first respondent and Dato' Khoo Peng Lai, the second respondent as liquidators of a company known as Folin and Brothers Sdn Bhd ('Folin').

LEAVE TO APPEAL

[2] The appellants sought for leave to appeal against the decision of the Court of Appeal to the Federal Court and leave was granted on the following question of law:

> Does r 173 of the Companies (Winding Up) Rules 1972 ('the Rules') prohibit payment of all the solicitors bills paid by the respondents from the assets of Folin and Brothers Sdn Bhd (in liquidation) to their solicitors, unless the said solicitors bills have been considered and allowed by the taxing officer?

BACKGROUND FACTS

[3] The registered proprietors of the shares of Folin are the first, second and third appellants together with one Wong Bung Sun (an undischarged bankrupt) and the estate of Wong Foo Ling. The appellants constituted 75% in value of the shareholders of Folin and are the only members of its committee of inspection. The first appellant is the largest creditor of Folin. Folin which is a family company was ordered to be wound up by the High Court on 8 April 1987. The winding up petition was filed by the third appellant. The first and second respondents were appointed as the liquidators of Folin on 13 March 1997 replacing the previous liquidators. Folin's only substantial assets are the 99.99% shares it owns in its subsidiary, known as Folin Food Processing Sdn

Bhd ('Folin Food'). Folin Food has been dormant for more than 20 years and its sole asset is a commercial property referred to as 'Lot 16' generating a monthly rental income of RM48,000.

[4] Upon taking office, the respondents faced various litigations which they had to pursue and defend with the active collaboration and participation of the appellants, particularly the first appellant. The filing of encl 368 by the appellants for the removal of the first and second respondents as liquidators must be examined in the light of the history of litigation endured by the appellants and the respondents as liquidators. This can be briefly set out as follows.

[5] The first so-called oppression suit was launched by the appellants against the respondents in 2008 when they sought to injunct the respondents from exercising their right to vote in favour of a voluntary liquidation of Folin Food. It is pertinent to note that Folin was not a party to the oppression suit. The first oppression suit was resolved by a consent order dated 4 June 2009 ('the consent order') which essentially provided for the valuation of Folin Food's shares by Ernst & Young ('EY'), and upon the ascertainment of its 'fair price' a sale and purchase agreement was to be entered within 30 days. The shares were valued by EY and the respondents were unhappy with the said valuation by EY.

[6] The respondents were of the view that EY's valuation was flawed in law and did not represent a 'fair value' and hence was not in accordance with the consent order. As a result, the respondents commenced a suit vide Kuala Lumpur High Court Suit No D-22NCC-674 of 2009 ('the consent order suit') on 14 December 2009 to essentially have the shares of Folin Food revalued. The appellants counterclaimed for specific performance of the sale and purchase agreement. On 21 January 2011 the High Court dismissed the respondents' claim in the consent order suit and allowed the appellants' counterclaim. However, on 5 May 2011, the Court of Appeal allowed the respondents' appeal and ordered EY to appoint an independent property valuer to revalue the shares of Folin Food. On 9 November 2011, the Federal Court dismissed the appellants' application for leave to appeal.

[7] It is in the midst of the consent order suit that the removal application under s 232 of the Act vide encl 368 was filed by the appellants in order to further their cause in the consent order suit.

FINDINGS OF THE HIGH COURT

[8] The learned judge of the High Court dismissed the application in encl 368 with costs. The appellants in filing encl 368 for removal of the respondents as liquidators had cited many grounds of which only one is pertinent for the

purpose of the present appeal to the Federal Court as the question of law allowed to be argued is confined to only one of the grounds raised in the encl 368 application. The relevant ground raised in the encl 368 application before the High Court which forms substantially the question of law now posed to the Federal Court for its determination is as follows:

> that the respondents paid the bills of solicitors acting for Folin without taxation of their bills contrary to r 173 of the Winding Up Rules 1972.

The findings of the learned High Court judge on the above particular ground and, inter alia, as follows:

> Rule 173 only applies in respect of services rendered in the course of assisting the liquidator in the ordinary administrative and management duties of the liquidators as envisaged under s 236(1) of the Companies Act 1965 (see: *Selvam Holdings (M) Sdn Bhd v Toby Lam* [1994] 4 CLJ 899; *Subterranean Natural Mineral Water Sdn Bhd v Kho Boon Kwana* [2002] 2 MLJ 439; *Kang Wah Construction Sdn Bhd v Chan Ai Min Property Sdn Bhd* [1999] 4 MLJ 262; and *Oriental Finance Bhd v Syarikat Seri Paroi Sdn Bhd* [2003] 7 CLJ 414). In the present case, the services of the lawyers as explained in the affidavits in the oppression suit was for defending an action on behalf of Folin Brothers under s 236(2) of the Companies Act 1965. The liquidators have obtained an order dated 17 September 1997 from the winding up court to appoint the lawyers to act for Folin Brothers. The first appellant was responsible for negotiating the fees with the solicitors and the cheques for the payments were only signed by the liquidators after the payments were approved by the first appellant or the second appellant. In other words, the so-called 'unauthorised payments made without taxation of the bills' were made after getting approval either the first or second appellants. The Liquidators should not be held responsible and the appellants have no ground to complain. The liquidators have not committed any wrong doing in making such payments.

FINDINGS OF THE COURT OF APPEAL

[9] Aggrieved by the decision of the High Court the appellants appealed to the Court of Appeal. The Court of Appeal in turn dismissed the appellants' appeal. The Court of Appeal was in agreement with the findings of the learned judge of the High Court that r 173 of the Rules only applies in respect of services rendered in the course of assisting the liquidator in the ordinary administrative and management duties of the liquidators as envisaged under s 236(1) of the Act. Further, the Court of Appeal, inter alia, made a finding on the appellants' encl 368 application as follows:

> Looking at the whole circumstances of the case in its proper perspective, the court is satisfied that the application vide encl 368 was not made in the interest of the company, Folin Brothers in liquidation. It was made at the tail end of the liquidation process, ie to sell and transfer the shares of Folin Food, owned by Folin Brothers to the appellants at a fair price as envisaged by the consent order. To remove the respondents at this stage of the process is clearly inappropriate and not in the interest

of the company and its creditors as a whole. The only persons who will benefit most if the liquidators are removed at the present stage are the appellants themselves — for being able to buy the shares of Folin Food (the only asset owned by Folin Brothers) at an undervalued price as determined by Ernst & Young under the consent order, detrimental to the interest of other creditors and other contributories. The application vide enc 368 is brought by the appellants clearly for the collateral purpose of controlling Folin, Folin Food and their assets so as to enrich themselves. This is an abuse of the process of the court and should not be allowed.

DECISION OF THIS COURT

[10] At the outset we reproduce herein the provision of r 173 of the Rules as follows:

> No payments in respect of bills or charges of solicitors, managers, accountants, auctioneers, brokers or other persons other than payment for costs and expenses incurred and sanctioned under rule 45, and payments of bills which have been taxed and allowed under orders made for the taxation thereof, shall be allowed out of the assets of the company without proof that the same have been considered and allowed by the taxing officer. The taxing officer shall satisfy himself before passing the bills or charges that the employment of a solicitor or other person to assist the liquidator in the performance of his duties in respect of the matters mentioned in the bills or charges has been duly sanctioned. Provided that the Official Receiver when acting as liquidator may without taxation pay and allow the costs and charges of any person employed by him where the costs and charges are within the scale usually allowed by the Court and do not exceed the sum of $100.

[11] Learned counsel for the appellants submitted before us amongst others that r 173 of the Rules clearly provides that no payments for solicitors' bills other than that sanctioned under r 45 of the Rules shall be allowed out of the assets of the company in liquidation unless taxed and allowed by the taxing officer. Rule 45 of the Rules deals with costs or expenses incurred by a person who is required to make a statement of affairs for the company in liquidation. This exception according to the appellants is therefore irrelevant for the purposes of this appeal.

[12] Learned counsel for the appellants further submitted that r 173 of the Rules should be read together with r 165 of the Rules which provides that on request of a liquidator, a solicitor shall deliver a bill of costs to the taxing officer to be taxed, and if he fails to do so, dividend will be distributed without regard to the solicitor's claim. In other words, if the solicitors' bill is not taxed, the liquidator shall not pay such bills.

[13] It is the contention of the appellants that r 173 of the Rules ought to be read as requiring all solicitors' bills to be taxed so that the assets of a company

in liquidation are protected and the use of such assets are subject to the scrutiny of the court. In the case of taxation of a solicitors' bill where the appointment of the solicitor has to first be sanctioned by the court or the committee of inspection, then r 173 of the Rules provides the additional requirement that the taxing officer must be satisfied that the employment of such a solicitor was in fact sanctioned.

[14] Having heard the submission of learned counsel for the appellants and the respondents, we are in agreement with the findings of both the High Court and the Court of Appeal. We are of the view r 173 of the Rules which requires bills to be submitted to the taxing officer only applies in respect of services rendered in the course of assisting the liquidator in the performance of his duties in respect of the matters mentioned in the bills or charges that has been duly sanctioned.

[15] It is our considered view that the provision of r 173 of the Rules is meant only to apply to the services as envisaged under s 236(1) of the Act. Section 236(1) of the Act provides as follows:

> (1) The liquidator may with the authority either of the Court or of the committee of inspection —
>
> (a) carry on the business of the company so far as is necessary for the beneficial winding up thereof, but the authority shall not be necessary to so carry on the business during the four weeks next after the date of the winding up order;
>
> (b) subject to section 292 pay any class of creditors in full;
>
> (c) make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim, present or future, certain or contingent, ascertained or sounding only in damages against the company, or whereby the company may be rendered liable;
>
> (d) compromise any calls and liabilities to calls, debts and liabilities capable of resulting in debts and any claims, present or future, certain or contingent, ascertained or sounding only in damages subsisting or supposed to subsist between the company and a contributory or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets or the winding up of the company, on such terms as are agreed, and take any security for the discharge of any such call, debut, liability or claim, and give a complete discharge in respect thereof; and
>
> (e) appoint an advocate to assist him in his duties.

[16] Based on the above provision of s 236(1) of the Act it is clear that it refers to the services rendered to the liquidator in the ordinary administrative and management duties of the liquidator. On this point useful reference can be

made to the case of *Zaitun Marketing Sdn Bhd v Boustead Eldred Sdn Bhd (formerly known as Bousted Trading (1985) Sdn Bhd)* [2010] 2 MLJ 749; [2010] 3 CLJ 785 wherein Zaki Tun Azmi CJ in delivering the judgment of the Federal Court drew the distinction on the scope of application relating to the appointment of an advocate by a liquidator between the provisions of s 236(1)–(2) of the Act. The learned CJ at p 755(MLJ); pp 793–794 had this to say:

> An appointment of an advocate by a liquidator pursuant to s 236(2)(a) of the Companies Act does not require leave of the court because he clearly needs the services of an advocate to bring or defend a legal action. Only the appointment under s 236(1)(e) requires the leave of the court and that is when he needs an advocate to assist him in his ordinary administrative and management duties of a liquidator such as those that are within his ordinary professional competence.

[17] It is to be noted in the present case the services of an advocate as explained in the affidavits in the first oppression suit is for bringing and defending action on behalf of Folin under s 236(2) of the Act. Therefore they do not fall under r 173 of the Rules. Learned counsel for the appellants however impressed upon us that r 173 of the Rules should be read together with r 165 of the Rules which stated, inter alia, that a solicitor shall deliver a bill of costs to the taxing officer to be taxed. With respect we could not agree. We are of the view that r 165 of the Rules gives the liquidator the discretion whether to tax or not. Rule 165 of the Rules provides as follows:

> Every solicitor, manager, accountant, auctioneer, broker or other person employed by a liquidator in a winding-up by the Court, shall on request by the liquidator in Form 84, to be made a sufficient time before the declaration of a dividend, deliver his bill of costs or charges to the Taxing Officer for the purpose of taxation; and if he fails to do so within the time stated in the request or such extended time as the Registrar may allow, the liquidator shall declare and distribute the dividend without regard to such person's claim.

[18] It is clear from the above provision of r 165 of the Rules that it is only upon request by the liquidator that a solicitor shall deliver a bill of costs to the taxing officer to be taxed. Rule 165 of the Rules is therefore a discretionary provision.

[19] Learned counsel for the appellants in support of his argument that r 173 of the Rules is applicable to the present case referred to us the Singapore High Court case of *Re Micropolis (S) Ltd* [1998] 3 SLR 951 wherein it was held, inter alia, that on the equivalent provision of our r 173 of the Rules that the liquidator must insist on a taxed bill before he can pay the charges out for the assets of the company.

[20] We would like to state here that even in a situation where r 173 of the Rules is applicable, as in the case of *Re Micropolis (S) Ltd*, His Lordship GP Selvam J in delivering the judgment of the court had expressed his reservation on the said provision at p 953 as follows:

> I must, nonetheless, hasten to add that my decision leads to absurd and unfair results because it places the liquidators in an invidious and untrustworthy position of not honoring his word and having to ask all those whom he engaged to go through a charade of taxation and increase the drain on the assets of the company.
>
> … in short, the rule is not in the interest of the company or the creditors and is decidedly adverse to their interest In practice no one abides by it. I would therefore suggest that the rule be amended giving liberty to the liquidator to pay out of the assets of the company and those which he is legally obliged to pay.

[21] It is our judgment that on the facts, the present case can be distinguished from the case of *Re Micropolis (S) Ltd*. In the case of *Re Micropolis (S) Ltd* the interpretation of the court was sought for on the equivalent provision of our r 173 of the Rules by the liquidators themselves for fear that before they can make the payments they felt they had to clear the so-called legal barricade erected by r 173. However, in the present case the interpretation of r 173 of the Rules sought for by the appellants was made in the context of their application to remove the respondents as liquidator. It is to be noted in the present case the liquidators have obtained an order dated 17 September 1997 from the winding up court to appoint solicitor to act for Folin. It is also to be noted as found by the learned judge of the High Court that the first appellant was responsible for negotiating the fees with the solicitors and the cheques for the payments were approved by the appellants.

[22] We would state here that the r 173 of the Rules question as posed by the appellants in the present case has no relevance in deciding the integrity of the respondents and their removal as liquidators. In practice the solicitors bills are not taxed. Therefore, even if r 173 of the Rules question is answered in the affirmative in that the liquidators ought to have the solicitors bills taxed before making payment, we are of the view that based on the factual circumstances of this case, the respondents could not be said to have acted so unreasonably that no other liquidators would have acted in the manner which they did.

[23] The appellants' application vides encl 368 is based on s 232(1) of the Act s 236(1) of the Act which provides that a liquidator appointed by the court may on cause shown be removed by the court. The principles of law governing an application to remove a provisional liquidator (or liquidator) are well set out as in the case of *Ng Yok Gee & Anor v CTI Leather Sdn Bhd (Metro Brilliant Sdn Bhd & Ors, interveners)* [2006] 7 MLJ 28 and include the following:

(a) the court does not have an unfettered discretion, as cause must be shown

before a liquidator can be removed. The position is not the same as it is when a liquidator is first appointed and the court may choose between two or more competing candidates;

(b) the normal grounds for removal are that the liquidator has a personal unfitness, has failed to act impartially or is in a position where his duty and interest are in conflict; and

(c) the removal of the liquidator must be in the interest of all those who are interested in the company being liquidated. Thus, all the contributories and creditors of the company being liquidated must support such application to remove the liquidator.

[24] Based on the above principles of law, we are of the view that the court should be slow to interfere with any act or decision of the liquidators in discharging their roles in company liquidation and will do so only if it is so unreasonable and absurd that no reasonable person would have acted in that way. The court will not interfere with the decision simply because its opinion might differ from that of the liquidator (see the case of *Andrew Christopher Chuah Choong Eng Chuan v Ooi Woon Chee & Anor* [2007] 2 MLJ 12).

CONCLUSION

[25] For the reasons abovestated we would answer the question posed in this appeal in the negative. In the result we therefore dismiss the appellants' appeal with costs. We award a sum of RM20,000 to the respondents as costs. The deposit is to be refunded to the appellants.

Appeal dismissed with costs.

Reported by Ashok Kumar